A

YAP KE HUAT & ORS

v.

PEMBANGUNAN WARISAN MURNI SEJAHTERA SDN BHD & ANOR

B

COURT OF APPEAL, PUTRAJAYA
JAMES FOONG JCA
KN SEGARA JCA
ABU SAMAH NORDIN JCA
C [CIVIL APPEAL NO: C-02-1194-2005]
14 MARCH 2008

D ***CIVIL PROCEDURE:*** *Judgment - Default judgment - Setting aside - Directors of company did not enter appearance within time stipulated - Whether there was service of writ and statement of claim - Whether claim for debts and liabilities of company - Whether resignation of directors rendered them liable - Whether judgment void for non-compliance with O. 13 r. 6(1) Rules of the High Court 1980*

E ***CIVIL PROCEDURE:*** *Service - Writ of summons and statement of claim - Service by AR registered post - Whether prima facie proof of service - Whether plaintiff must show proof of receipt*

F ***CIVIL PROCEDURE:*** *Judgment - Default judgment - Default of appearance - Whether O. 13 r. 6(1) RHC 1980 complied with - Whether plaintiffs entitled to enter judgment without motion for judgment - Whether plaintiff's claims fell within descriptions specified under rr. 1-4 of O. 13*

G The plaintiffs obtained a default judgment against the defendants due to the non-appearance of the 2nd to 6th defendants who were directors of the 1st defendant company. The defendants' application to set aside the default judgment was dismissed by the learned judge. The defendants appealed and raised the following issues: (1) that the plaintiffs failed to prove that the writ and
H statement of claim was received by the relevant defendants; (2) that the relevant defendants as directors were not liable for the debts and liabilities of the 1st defendant; (3) that the relevant defendants were not liable as they had resigned as directors; and (4) that the plaintiffs were not entitled to enter the default
I judgment without the need for a motion to do so contrary to O. 13 r. 6(1) of the Rules of the High Court 1980 ('RHC') since the plaintiffs' claims fell outside the descriptions specified under rr. 1-4 of O. 13.

Held (dismissing the appeal with costs)
Per James Foong JCA delivering the judgment of the court:

(1) When considering an application to set aside a judgment in default, the first task is to ascertain whether it is a regular or irregular judgment. If it is an irregular judgment, then the default judgment ought to be set aside *ex debitio justitae*. If it is regularly obtained, then the principle expounded in *Evans v Bartlam* applies (see the Federal Court judgment in *Hasil Perumahan Sdn Bhd & Ors v. United Malayan Banking Berhad*. This requires the defendant to show that he has a defence on merits. Delay in making such application is a factor to be considered by the court in deciding whether to grant or refuse the application. The learned judge applied these principles of law correctly when evaluating the application. However, his ruling that the application was made out of time was wrong as the facts showed that the application was made well within the 30-day period as stipulated under O. 42 r. 13 RHC. (paras 15 & 16)

(2) There was no provision of law that the plaintiffs must also prove that the person so named in the post had received the writ of summons and statement of claim. Once the writ and statement of claim are sent by AR registered post, it is *prima facie* proof of service unless the defendant is able to rebut this. From the facts, that presumption was not rebutted. (paras 20, 21 & 22)

(3) The claim against the defendants was one of conspiracy, breach of fiduciary duty and breach of trust. Those matters were beyond the bounds of the general protection offered to a director of a company for debt and liability of the company. They were personal claims against them. The agreements between the plaintiffs and the 1st defendant merely contained terms of a transaction between those two parties. They did not exempt the defendants from personal acts alleged to be committed by them. (para 24)

(4) As for the 4th and 6th defendants' claim that they had resigned as directors of the 1st defendant, the facts showed that the claims against them were for events that had occurred before their resignation. (para 28)

(5) The plaintiffs had abandoned their claims for accounts and declaration. They had elected to limit their claim within O. 13 r. 2 RHC. That could be seen from the contents of the default judgment for unliquidated damages to be assessed and costs. That was well within the rules for judgment in default to be entered. It followed that the plaintiffs were entitled to enter the default judgment without a motion for judgment. (para 39)

Bahasa Malaysia *Translation Of Headnotes*

Plaintif-plaintif telah memperoleh penghakiman ingkar terhadap defendan-defendan disebabkan oleh ketidak-hadiran defendan-defendan kedua hingga keenam yang merupakan pengarah-pengarah defendan pertama. Permohonan defendan-defendan untuk mengenepikan penghakiman ingkar telah ditolak oleh yang arif hakim. Defendan-defendan merayu dan membangkitkan isu-isu berikut: (1) bahawa plaintif-plaintif gagal membuktikan bahawa writ dan pernyataan tuntutan telah diterima oleh defendan-defendan berkenaan; (2) bahawa defendan-defendan berkenaan selaku pengarah-pengarah tidak bertanggungan atas hutang dan liabiliti defendan pertama; (3) bahawa defendan-defendan berkenaan tidak bertanggungan kerana mereka telah pun meletak jawatan sebagai pengarah-pengarah; dan (4) bahawa plaintif-plaintif tidak berhak memasukkan penghakiman ingkar kerana gagal melakukannya melalui suatu usul mengikut kehendak A. 13 k. 6(1) Kaedah-kaedah Mahkamah Tinggi 1980 ('RHC'), memandangkan tuntutan plaintif-plaintif tidak termasuk ke dalam pemerihalan yang dinyatakan di bawah kk. 1-4, A. 13.

Diputuskan (menolak rayuan dengan kos)

Oleh James Foong HMR menyampaikan penghakiman mahkamah:

(1) Apabila menimbang sesuatu permohonan untuk mengenepikan suatu penghakiman ingkar, tugas yang pertama adalah menentukan sama ada ianya satu penghakiman yang teratur atau sebaliknya. Jika ia satu penghakiman yang tidak teratur, maka penghakiman ingkar itu harus diketepikan *ex debitio justitae*. Jika ia diperolehi secara teratur, maka prinsip seperti yang dibentang di dalam *Evans v. Bartlam* terpakai (lihat penghakiman Mahkamah Persekutuan di dalam *Hasil Perumahan*

Sdn Bhd & Ors v. United Malayan Banking Berhad). Ini memerlukan seseorang defendan itu membuktikan bahawa ia mempunyai pembelaan di atas merit. Kelengahan dalam membuat permohonan itu adalah satu faktor yang perlu dipertimbang oleh mahkamah dalam menentukan sama ada untuk membenar atau menolak permohonan. Yang arif hakim telah menggunapakai prinsip-prinsip ini dengan betul apabila menimbang permohonan. Bagaimanapun, keputusan beliau bahawa permohonan dibuat di luar masa adalah khilaf kerana fakta menunjukkan bahawa permohonan jelas dibuat dalam tempoh 30 hari seperti yang ditetapkan A. 42 k. 13 RHC.

(2) Tiada peruntukan undang-undang bahawa plaintif-plaintif juga perlu membuktikan bahawa orang yang dinamakan di dalam pos telah menerima writ saman dan pernyataan tuntutan. Sebaik writ dan pernyataan tuntutan dihantar melalui pos berdaftar AR, ia adalah *prima facie* bukti penyerahan kecuali jika defendan dapat menyangkalnya. Berdasarkan fakta, andaian telah tidak disangkal.

(3) Tuntutan terhadap defendan-defendan adalah kerana konspirasi, kemungkiran tanggungjawab fidusiari dan pecah amanah. Perkara-perkara ini berada diluar lingkungan perlindungan biasa yang diberikan kepada pengarah syarikat berkaitan hutang dan liabiliti-liabiliti syarikat. Ia adalah tuntutan peribadi terhadap mereka. Perjanjian di antara plaintif-plaintif dan defendan pertama hanya mengandungi terma-terma suatu transaksi di antara mereka. Ia tidak mengecualikan defendan-defendan dari perlakuan-perlakuan peribadi yang dikatakan dilakukan oleh mereka.

(4) Mengenai dakwaan defendan-defendan kempat dan keenam bahawa mereka telah meletak jawatan sebagai pengarah-pengarah defendan pertama, fakta menunjukkan bahawa tuntutan terhadap mereka adalah berkaitan peristiwa-peristiwa yang berlaku sebelum mereka meletak jawatan lagi.

(5) Plaintif-plaintif telah memansuhkan tuntutan mereka berkaitan akaun dan deklarasi. Mereka memilih untuk menghadkan tuntutan mereka di dalam lingkungan A.13 k. 2 RHC. Ini dapat dilihat dari kandungan penghakiman ingkar untuk gantirugi tak jumlah tertentu yang perlu dinilai serta kos. Maka

A ia jelas berada dalam rangkuman kaedah-kaedah penghakiman ingkar yang akan dimasukkan. Ianya dengan itu mengikut bahawa plaintif-plaintif berhak untuk memasukkan penghakiman ingkar tanpa suatu usul untuk penghakiman.

B **Case(s) referred to:**
Evans v. Bartlam [1937] AC 473 ***(refd)***
Hasil Bumi Perumahan Sdn Bhd & Ors v. United Malayan Banking Berhad [1994] 1 CLJ 329 SC ***(refd)***
Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor [1997] 3 CLJ 305 FC ***(refd)***
C *Lam Kong Co Ltd v. Thong Guan Co Pte Ltd [1985] 1 CLJ 412; [1985] CLJ (Rep) 181 SC* ***(refd)***
MBf Finance Bhd v. Tiong Kieng Seng [2001] 4 CLJ 38 HC ***(refd)***
Morley London Developments Ltd v. Rightside Properties Ltd [1973] 231 EG 235 ***(refd)***
D *Pengkalen Concrete Sdn Bhd v. Chow Mooi & Anor [2003] 6 CLJ 326 HC* ***(refd)***
Tuan Hj Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd [1996] 1 CLJ 241 FC ***(refd)***

Legislation referred to:
E Rules of the High Court 1980, O. 10 r. 1, O. 13 rr. 1, 2, 3, 4, 6(1), O. 42 r. 13

Rules of Supreme Court 1965 [UK], O. 13 r. 6(1)

For the defendants/appellants - Lai Chee Meng; M/s Bahari, Choy & Nongchik
F *For the plaintiffs/respondents - Umisalamah Abd Latiff; M/s GK Ganesan Saiful & Rokiah*

[Appeal from High Court, Temerloh; Civil Suit No: 22-45-2004 & High Court, Kuantan; Suit No: MT(1) 22-94-2003]

G

Reported by Usha Thiagarajah

JUDGMENT

H

James Foong JCA:

Introduction

[1] This appeal concerns only one issue: whether the appellants I are allowed to set aside a judgment in default of appearance entered against them. The High Court has dismissed their application to set aside, thus this appeal to us.

Background

[2] The background of this case is relatively straight forward. The plaintiffs have filed this civil suit against six defendants. The 1st defendant is a company which the plaintiff claims the 2nd to 6th defendants (the appellants in this appeal) are and/or were at all material times directors. The causes of action in this suit as mentioned in para. 16 of their statement of claim are:

(a) Breach of Contract;

(b) Conspiracy as between the defendants to injure the plaintiffs;

(c) The defendants' breach of their duties as fiduciaries to the plaintiffs;

(d) The defendants' breach of their duties as constructive trustees to the plaintiffs; and

(e) The defendants' fraudulent breach of trust.

[3] The reliefs sought by the plaintiffs are:

(1) An account be taken of all sums due from the defendants to the plaintiffs in respect of all the causes of actions;

(1.1) That Messrs A. Pathmarajah & Co, Public Accountants, a firm of accounts, or such other fit and proper accountant/s be appointed to take the said accounts;

(1.2) That in order to carry out their duties, the said accountant be granted leave to adopt such procedures as would amount to Investigative Accounting procedures;

(1.3) In furtherance of their duties, and from time to time, the said accountants be allowed ingress and egress into such venues or places belonging to, in the custody of or under the control of the defendants and/or their servants and/or agents as the accountants may find proper and expedient;

(1.4) In the event the defendants and/or their servants and/or agents refuse to allow access for the accounts in the carrying out of their duties, the accountants be granted leave to enter into;

A (2) An order for payment by the defendants to the plaintiffs of all sums found to be due from the defendants to the plaintiffs on the taking of the accounts aforesaid;

(3) A declaration that all sums of moneys in the hands of the
B defendants are the assets of the plaintiffs;

(4) General damages for:

(a) breach of contract;

C (b) fraudulent breach of trust;

(c) the defendants or each of their respective breaches of duties as fiduciary to the plaintiffs;

(d) the defendants' breach of their duties as constructive
D trustees to the plaintiffs;

(c) the defendants' fraudulent breach of trust;

(5) Interest at the rate of 8% per annum for all sums awarded of all the matters hereinabove pleaded, from the date of the
E breach up to the date of judgment;

(6) Interest at the rate of 8% per annum for all sums awarded from the date of judgment until full and final settlement;

F (7) Costs on a solicitor client basis by reason of the conduct of the defendants; and

(8) Such further and other relief that this Honourable Court deems fit and proper.

G **[4]** According to the affidavit of service of the plaintiffs' process server, he served the writ and the statement of claim on all the defendants on 5 January 2003 by way of prepaid A.R. registered post: on the 1st defendant at No. 32, Kampong Baru, Kuala Krau, 28050 Temerloh, Pahang; on the 2nd, 3rd and 4th
H defendants at No 8, Jalan Besar, Kuala Krau, 28050 Temerloh, Pahang; and on the 5th and 6th defendants at No. 32, Kampung Baru, Kuala Krau, 28050, Temerloh, Pahang.

[5] Only the 1st defendant entered memorandum of appearance,
I but not the rest of the defendants.

[6] The exhibits attached to the plaintiffs' process server's affidavit reveal that the A.R. registered post acknowledgment cards for posting to the 2nd to 5th defendants were returned by the post office showing a signature of the recipient and the name of the 4th defendant written thereon. The A.R. registered post acknowledgment card for service on the 6th defendant was not returned by the post office.

[7] When the 2nd to 6th defendant did not enter appearance within the time stipulated under the Rules of High Court 1980 (RHC), the plaintiffs entered judgment in default against these defendants.

[8] This default judgment declares:

> Tidak kehadiran telah dimasukkan oleh Yap Ke Huat, Ong Ah Moy @ Ong Boon Eng, Yap Siew Kian, Yap So Sun dan Yap So Leong, iaitu defendan kedua, ketiga, keempat, kelima dan keenam dalam tindakan ini, maka adalah pada hari ini dihakimkan bahawa defendan kedua, ketiga, keempat, kelima dan keenam hendaklah membayar kepada plaintif-plaintif ganti rugi yang akan ditaksirkan.
>
> Adalah juga dihakimkan bahawa defendan kedua, ketiga, keempat, kelima dan keenam hendaklah membayar kepada peguamcara pihak plaintif kos yang akan ditaksirkan.

[9] Translated into English, briefly it means that due to the non-appearance of the 2nd to 6th defendant, it is hereby ordered that these defendants do pay the plaintiffs damages to be assessed, as well as costs to be assessed.

[10] A copy of this seal order was served on the 2nd to 6th defendant on 31 December 2004.

[11] On 25 January 2005, the 2nd to 6th defendant applied by way of summons-in-chambers to set aside this judgment in default. The first ground appearing in this application is that the 4th defendant had received the writ and statement of claim meant for all these defendants but did not inform the chairman of the 1st defendant. The defendants also believed that the solicitor acting for the 1st defendant would automatically represent them.

[12] Supporting this application are two affidavits: one by the 2nd defendant and the other by the 4th defendant. The 3rd, 5th and 6th defendants did not file any affidavit in support.

[13] The 2nd defendant affirmed in his affidavit that he did not receive the writ and statement of claim. It was the 4th defendant who received them for the 2nd, 3rd, 5th and 6th defendants. For this reason, he only informed the solicitors to represent the 1st defendant in this action. He then proceeded to assert that he is only a director of the 1st defendant. As such, he is not responsible for the debts and liabilities of the 1st defendant. He stressed that this is disclosed in two agreements signed between the plaintiffs and the 1st defendant. Further, he claimed that his two sons, the 4th and 6th defendant had ceased to be directors of the 1st defendant from 30 January 2002.

[14] The 4th defendant's affidavit said that he received the writ and statement of claim but did not inform the 2nd defendant because he himself has ceased to be a director of the 1st defendant. He only informed the 1st defendant and under the impression that the 2nd defendant had engaged solicitors to represent the 1st defendant, all the rest of the defendants would similarly be represented. He only realized the consequences of non-appearance when he received the judgment in default. He then stressed that though he was a director of the 1st defendant, he is not responsible for the debts and liabilities of the 1st defendant. Further, he stressed that the 1st defendant is not liable in view of the two agreements entered into between the plaintiffs and the 1st defendant. He then said that he has in fact resigned as a director of the 1st defendant on 30 January 2002.

Principles To Be Applied In An Application To Set Aside Judgment In Default

[15] It is trite that when considering an application to set aside a judgment in default, the first task is to ascertain whether it is a regular or irregular judgment. If it is an irregular judgment, then the default judgment ought to be set aside *ex debitio justitae*. If it is regularly obtained, then the principle expounded in *Evans v. Bartlam* [1937] AC 473 applies – see the judgment of the Federal Court in *Hasil Bumi Perumahan Sdn Bhd & 5 Ors v. United Malayan Banking Berhad* [1994] 1 CLJ 329. This requires the defendant to show that he has a defence on merits. Delay in making such application is a factor to be considered by the court

in deciding whether to grant or refuse the application – see *Tuan Haji Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd* [1996] 1 CLJ 241.

[16] Having perused the grounds of judgment of the High Court, we are of the view that the court below had applied these principles of law correctly when evaluating the application. However, with regards to the ruling by the High Court that the application was made out of time, we regret to say that this finding is wrong in the face of these facts: Judgment in default was served on these defendants on 31 December 2004. They filed this application to set aside on 12 January 2005. This was well within the period of 30 days set out under O. 42 r. 13 RHC to make such application. We believed that the High Court had mistakenly considered the time to run from the date of judgment rather than from the time when the judgment was received by these defendants as provided by O. 42 r. 13 RHC which says:

> Where in these rules provisions are made for the setting aside or varying of any order or judgment, a party intending to set aside or to vary such order or judgment must make his application to the court and serve it on the party who has obtained the order or judgment **within thirty days after the receipt of the order or judgment by him** (emphasis added).

Analysis

[17] Apart from this, we are of the view that what was decided by the High Court is correct. We apprehend below our reasons for coming to this conclusion. As circumstances faced by each of these defendants is different, we shall deal with them individually in turn.

2nd Defendant

[18] It is the contention of the 2nd defendant that the learned High Court judge was wrong in deciding that the judgment in default is a regular judgment. He contented that the writ and statement of claim were never served on him in the sense that he never received it. It was received by his son, the 4th defendant, who never informed him of this.

[19] According to O. 10 r. 1(1) RHC:

> Subject to the provisions of any written law and these rules, a writ must be served personally on each defendant **or by sending it by prepaid AR registered post** addressed to his last known address and so far as is practicable, the first attempt at service shall be made not later than one month from the date of issue of the writ (emphasis added).

[20] In this instance, the plaintiffs had elected to serve the writ and statement of claim on this defendant by way of sending it by prepaid A.R. registered post. This defendant did not challenge that such process was never undertaken. Once this process was carried out, it is our view that there is no provision in law to say that the plaintiffs must also prove that the person so named in the post had received it. This opinion is shared by Suriyadi Halim J (as he then was) when he said in *Pengkalan Concrete Sdn Bhd v. Chow Mooi & Anor* [2003] 6 CLJ 326:

> In fact under sub-r. 1(1) of O. 10, nothing is indicated that the plaintiff must evidentially prove that the named person in the writ must be the very person who had received it ie, if it was sent by prepaid AR registered post. I therefore was satisfied that as in this case, if all the prerequisites were fulfilled, as the plaintiff had done so, the recipient being "Yanti" (not the name of the defendants) did not vitiate that service.

[21] This sentiment seems to be repeated in another High Court decision of *MBf Finance Bhd v. Tiong Kieng Seng* [2001] 4 CLJ 38. Thus, once the writ and statement of claim are sent by AR registered post it is *prima facie* proof of service unless the defendant is able to rebut this.

[22] Flowing from this, we now need to examine the evidence to ascertain whether this defendant has adduced any creditable evidence to rebut this presumption. From the facts, all that this defendant said in his affidavit was that he did not receive these documents but under the same breath, he disclosed that he had knowledge that the writ and statement of claim were served on the 1st defendant of which he is a director, and he even instructed solicitors to act for the 1st defendant. From the affidavit of the 4th defendant, we got to know that upon receipt of the writ and statement of claim by him, he informed the 1st defendant. Though he did not reveal who in the 1st defendant did he inform, but

when he said that he was under the impression that the 2nd defendant would engage solicitors to represent all of them, it implies that the 2nd defendant had knowledge that the writ and statement of claim were also served on him otherwise, the 4th defendant would not hold such view. From these facts, we are not convinced that this defendant has rebutted the presumption that the writ and statement of claim were served on him.

[23] When the judgment is a regular judgment, this defendant:

> must show to the court that he has a defence that has some merits of which the court should try. To use common and plain language, the applicant must show that his defence is not a sham defence but one that is *prima facie*, raising serious issues as a *bona fide* reasonable defence that ought to be tried because obviously if the defence is a sham defence, there is no defence and the application must fail – Jemuri Serjan CJ (Borneo) in *Hasil Bumi Perumahan Sdn Bhd & 5 Ors v. United Malayan Banking Corp Bhd (supra)*.

[24] This leads us to the next question: whether this 2nd defendant has satisfied this condition. Our answer to this is in the negative. The only relevant part of his affidavit associated with this issue is where he said that as a director he is not responsible for the debts and liabilities of the 1st defendant, and that there were two agreements signed between the 1st defendant and the plaintiffs. Firstly, even accepting that under the general principle of company law a director is not liable for the debt and liability of the company, the claim against him and the other defendants is one of conspiracy, breach of fiduciary duty as well as breach of trust. These are matters that are beyond the bounds of the general protection offered to a director of a company for debt and liability of the company which he is a director. These are personal claims against him and he has not disclosed a defence on merit that ought to be tried. The agreements between the plaintiffs and the 1st defendant merely contain terms of a transaction between these two parties. They do not exempt this defendant from personal acts alleged to be committed by him.

3rd Defendant

[25] The 3rd defendant did not file an affidavit to support the application to set aside. We guess he relied on the affidavits of the 2nd and 4th defendants. But as stated, once it is proved that the writ and statement of claim were posted by prepaid A.R. registered post to this defendant at his address then it is deemed

that he has received it unless he can adduce credible evidence to rebut it. Without an affidavit or an affidavit of another who expressly declares that he is affirming it for and on his behalf, there is no evidence from this particular defendant to show that the writ and statement of claim were not served on him.

[26] When the judgment in default against him is a regular judgment, then he has to show to the court that he has a defence on merit. Without an affidavit or evidence derived from elsewhere to disclose this, then his application to set aside the judgment in default must fail.

4th Defendant

[27] In respect of this defendant, the service of the documents on him was good service in view of his admission that he received them personally. His excuse that he was under the impression that the 2nd defendant would engage counsel to represent him and the rest of the defendants is, in our view, not reasonable ground to warrant a finding that the judgment in default against him is irregular.

[28] When the judgment in default is a regular judgment, the next consideration is whether this defendant is able to show that he has a defence on merit. Based on what he has disclosed and those by the 2nd defendant, we found none that can be sustained. His excuse is similar to that of the 2nd defendant that while being a director of the 1st defendant, he should not be held responsible for the debt and liability of the 1st defendant, what more when he has resigned from the 1st defendant since 30 January 2002. But the claim against him, like that of the 2nd defendant, is over and above the exemption of a director from liability and debts of a company. Further, this claim against him is a personal one for events that occurred between 1985 till 2001, well before he relinquished his role as a director of the 1st defendant. Again, the terms of the two agreements between the plaintiffs and the 1st defendant do not protect him from these claims of the plaintiffs.

5th Defendant

[29] This defendant, like the 3rd defendant, did not file an affidavit of his own to support the application to set aside. For the same reasons as expressed in our decision in respect of the 3rd defendant, we find the judgment in default against him a regular judgment. Also, as he has not shown any evidence that he has a defence on merit, the application to set aside must fail.

6th Defendant

[30] In respect of this defendant, the prepaid A.R. registered post acknowledgement card was not returned. But, following what we have expounded earlier, this does not mean that the service of the writ and statement of claim is deemed defective. What is demanded in O. 10 r. 1 RHC is that the writ (and in this case including the statement of claim) be sent by prepaid A.R. registered post to the defendant's last known address. When there is sufficient evidence of posting, as it is in this case, then under the rules, the writ (and statement of claim) is deemed to be served on the defendant. There is no necessity to prove that the acknowledgement of the A.R. registered posting has been returned. Of course, if it is returned by the Post Office then it is further proof that it was not only sent but also received. But for the purpose of service, proof of sending by prepaid A.R. registered post is sufficient.

[31] As the judgment in default is regular, then once again the next issue is whether this defendant has shown that he has a defence on merit. As disclosed, he has not filed an affidavit of his own nor did the 2nd and 4th defendants affirm their respective affidavits on his behalf. Though there is reference in the 2nd defendant affidavit that he has ceased to be a director of the 1st defendant on 30 January 2002, but the acts complained of by the plaintiffs are against him personally and committed before his resignation as a director. As this defendant has not shown that he has a defence on merit, the application to set aside must again fail.

Order 13 r. 6(1) RHC

[32] During the hearing of this appeal, the 2nd to 6th defendants' counsel submitted that the judgment in default is void *ex debitio justitae* for failing to comply with O. 13 r. 6(1) RHC. He elaborated that since the plaintiffs' action contains claims of a description not mentioned in r. 1 to 4 of O. 13 r. 6(1) RHC, the plaintiffs cannot enter judgment in default even though the defendants had failed to enter appearance. The plaintiffs were required to "proceed with the action as if that defendant had entered an appearance". He then stressed that the plaintiffs should not have entered default judgment against these defendants but to set down the action on motion for judgment. He cited to us the Supreme Court case of *Lam Kong Co Ltd v. Thong Guan*

Co (Pte) Ltd [1985] 1 CLJ 412; [1985] CLJ (Rep) 181 and the Federal Court case of *Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor* [1997] 3 CLJ 305.

[33] Order 13 r. 6(1) RHC states:

> Where a writ is endorsed with a claim of a description not mentioned in rr. 1 to 4, then, if any defendant fails to enter an appearance, the plaintiff may, after the time limited for appearing and upon filing an affidavit proving due service of the writ on that defendant and, where the statement of claim was not indorsed on or served with the writ, upon serving a statement of claim on him, proceed with the action as if that defendant had entered an appearance.

[34] The rational for this is explained in the judgment of Gopal Sri Ram in *Lai Yoke Ngan & Anor v. Chin Tech Kwee & Anor (supra)*:

> The philosophy underlying O. 13 r. 6(1) of the RHC is that specific relief is, by its very nature, discretionary. A defendant may well decide not to defend an action in which such relief is claimed in the honest belief that he has no defence upon question of liability. But that does not relieve the plaintiff from delivering his statement of claim and satisfying the court, upon a motion for judgment, that the case is a fit one for the grant of specific relief.

[35] As a refresher, r. 1 of O. 13 RHC refers to claim for liquidated damages; r. 2 is claim for unliquidated damages; r. 3 is claim for detinue; and r. 4 is claim for possession of immovable property. A quick reference to the reliefs sought by the plaintiffs in their statement of claim will immediately reveal that prayer 1 is for accounts; prayer 2 is associated with the first since it is a request for payments of money found due in the accounts; prayer 3 for a declaration; prayer 4 for unliquidated damages for breach of contract, breach of trust, and breach of fiduciary duty. After these, are general claims for interest and costs. From these, it is certain that prayers 1 to 3 are not within r. 1 to 4 of O. 13 RHC. In fact, the *Supreme Court Practice,* Malaysian Edition (1996 Reprint of 1979 Edition) adopting the English White Book declared at para 13/6/1 that if "there is endorsement on the writ a claim for an account, injunction, specific performance, declaration or rectification or other remedy or relief which falls outside the descriptions specified in rr. 1-4, the plaintiff cannot enter judgment in default of appearance, **unless he expressly and finally abandons every such remedy or relief** (emphasis added).

[36] Arguing against this contention, the plaintiffs brought to our attention that they had abandoned their claims for accounts and declaration. They had elected to limit their claim or confine it to only that falling within O. 13 r. 2 RHC. This can be seen from the contents of the judgment in default; it is only for unliquidated damages to be assessed and costs. This is well within the rules for judgment in default to be entered without the need for motion. The claim for accounts and declaration were dropped.

[37] Indeed, according to the English White Book of 1995 under O. 13 r. 6(1) of the Rules of Supreme Court 1965:

> The effect of para (1) is to preclude a plaintiff from entering judgment in default of notice of intention to defend in every case in which the indorsement on the writ contains or includes a claim which is not squarely within rr. 1 to 4 of this order, and to require him to proceed with the action as if that defendant had given notice of intention to defend. If, therefore, there is indorsed on the writ a claim for account, injunction, specific performance, declaration or rectification or other remedy or relief which falls outside the descriptions specified in rr. 1-4, the plaintiff cannot enter judgment in default of notice of intention to defend, *unless he expressly and finally abandons every such remedy or relief. On the other hand, the plaintiff is free to elect which relief he wants to pursue and he is under no duty to give prior notice of his election to abandon any form or relief which he originally claimed and on the effective abandonment of every remedy or relief outside the descriptions specified in rr. 1-4 he is entitled to enter a default judgment under these rules* (*Morley London Developments Ltd v. Rightside Properties Ltd* [1973] 231 EG 235 CA) (emphasis added).

[38] So the question before us is whether the plaintiffs had effectively, by only entering judgment in default for unliquidated sum to be assessed and cost, abandoned their claim for relief and remedy which do not fall within the description stipulated in r. 1 to 4 of O. 13 RHC, thereby entitling them to maintain that the judgment in default which they entered against these defendants is a regular judgment, not one that is void *ex debitio justitae*.

[39] It is our view that by confining themselves to the claim for unliquidated damages to be assessed and costs in the judgment in default, the plaintiffs had expressly elected to abandon their claim for accounts and declaration which are not within the description

of those stated in r. 1 to 4 of O. 13 RHC. Effectively, they had plainly volunteered to relinquish these claims and this is expressly mentioned in the judgment in default itself. This entitled them to enter judgment in default against these defendants without the need for a motion to do so. The English Court of Appeal decision of *Morley London Developments Ltd v. Rightside Properties Ltd* [1973] 231 EG 235 supports this when it was held that the plaintiff was free to choose the relief he wished to pursue, the only requirement being that at the time when the matter came to court he must make it plain what remedy he asked for; he was under no duty to give prior notice to the other side of his election.

[40] For these reasons, we find this last contention of these defendants without merit.

Conclusion

[41] Accordingly, we dismissed this appeal with costs. Deposit for this appeal to the respondents towards account of taxed costs.